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Antitrust—Robinson-Patman Act—No Salt Added: The Supreme Court Promotes Healthy Competition by Taking the Salt Out of the Robinson-Patman Act. Volvo v. Reeder-Simco, 126 S. Ct. 860 (2006).

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ANTITRUST—ROBINSON-PATMAN ACT—NO SALT ADDED: THE SUPREME COURT PROMOTES HEALTHY COMPETITION BY TAKING THE SALT OUT OF THE ROBINSON-PATMAN ACT. *Volvo v. Reeder-Simco*, 126 S. Ct. 860 (2006).

I. INTRODUCTION

"Judicial Activism" is a term frequently used in jurisprudential debates, yet there is not a clear consensus on the definition of the term.[1] One form of judicial activism occurs when a member of the judiciary invalidates a piece of properly enacted legislation.[2] Scholars criticize this form of judicial activism because it gives credence to an elite minority's viewpoint, rather than giving deference to the majority's will.[3] Another form of judicial activism occurs when a judge refuses to follow horizontal precedent.[4] Rather than criticize this form of activism, however, scholars have deemed it an appropriate exercise of the judiciary's constitutional authority.[5]

In *Volvo v. Reeder Simco*,[6] the Supreme Court narrowed the breadth of the Robinson-Patman Act ("Act"),[7] a seventy-year-old federal antitrust statute prohibiting price discrimination.[8] Although the Court's decision is an activist one,[9] the Court's activism is laudable because it overruled erroneous horizontal precedent.[10] Ideally, the legislature should have corrected the Court's error,[11] but legislative action in this case was improbable due to public resentment toward large corporations.[12] Moreover, the complexity of antitrust policies called for judicial action to ensure that the Robinson-Patman Act coincided with the broader goals of antitrust policy.[13]

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1. Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1443 (2004) (discussing how the definition of judicial activism varies depending on the context in which it is used).
2. *Id.* at 1463.
3. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 17 (1991).
4. Kmiec, *supra* note 1, at 1467. The doctrine of horizontal precedent requires a court to follow its past precedents. *Id.*
5. *Id.* at 1468.
6. 126 S. Ct. 860 (2006).
7. Margaret M. Zwisler, Volvo Trucks v. Reeder-Simco*: Judicial Activism at the Supreme Court?*, ANTITRUST, Summer 2006, at 40, 43.
8. *See* Discrimination in Price, Services, or Facilities, 15 U.S.C. § 13(a) (2006).
9. *See* Zwisler, *supra* note 7, at 43.
10. *See* discussion *infra* Part V.A.
11. Zwisler, *supra* note 7, at 43.
12. *See* discussion *infra* Part V.B.
13. *See* discussion *infra* Part V.C.

This note explores how the Court's decision in *Volvo* furthers the principle that the judiciary should correct flawed antitrust policy.[14] First, the note outlines the facts giving rise to the type of price discrimination claim arising in *Volvo*.[15] Next, it examines the background of price discrimination jurisprudence.[16] Following the background section, the Court's reasoning in *Volvo* merits examination.[17] The note concludes by examining the significance of *Volvo*, specifically addressing the desirability of judicial activism in *Volvo* and future antitrust cases.[18]

II. FACTS

Reeder-Simco ("Reeder") sued Volvo in February of 2000, alleging that Volvo engaged in price discrimination by giving Reeder's competitors greater price concessions than the price concessions given to Reeder.[19] To provide a factual background for the Supreme Court's decision in *Volvo*, this section reviews Reeder's relationship with Volvo,[20] the facts giving rise to Reeder's lawsuit,[21] and the decision of the Eighth Circuit Court of Appeals.[22]

A. Reeder's History with Volvo

Reeder was a dealer of Class 8 trucks, selling exclusively Volvo-manufactured trucks.[23] Reeder's agreement with Volvo assigned Reeder a geographic area where Volvo would not place another dealer; however, Reeder did not have the exclusive right to sell Volvo trucks in the area because Volvo dealers are allowed to sell trucks anywhere within the United States.[24] Reeder signed a five-year franchise agreement with Volvo, with an

14. *See* discussion *infra* Part V.C.
15. *See infra* Part II.
16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Part V.
19. Reeder-Simco v. Volvo, 374 F.3d 701, 705 (8th Cir. 2004). Reeder's suit alleged that Volvo violated the Robinson-Patman Act and the Arkansas Franchise Protection Act. *Id.* at 704. This case note, however, is limited to the Robinson-Patman Act claim because the Supreme Court's decision in *Volvo* addresses only the federal claim. Volvo v. Reeder-Simco, 126 S. Ct. 860, 865 (2006).
20. *See infra* Part II.A.
21. *See infra* Part II.B.
22. *See infra* Part II.C.
23. *See* Brief of Respondent at 6, Volvo v. Reeder-Simco, 126 S. Ct. 860 (2006) (No. 04-905). Class 8 trucks are heavy-duty trucks weighing over 33,000 pounds. *Id.* at 4. Principal manufacturers of Class 8 trucks, such as Volvo, manufacture base trucks with various component parts added to meet a customer's particular demand. *Id.*
24. *Id.* at 4.

automatic one-year extension if Reeder met Volvo's sales objectives.[25] Volvo could terminate the agreement for cause or if Reeder failed to meet certain sales objectives.[26]

As a Volvo dealer, Reeder determined the customer's product specifications and then negotiated a wholesale truck price from Volvo.[27] Volvo offered Reeder a wholesale price that was eighty percent of the retail price, but Volvo could reduce the price further by granting certain price concessions.[28] Volvo's district managers determined the size of the concession Volvo was willing to offer based on the particular truck and the price of similar trucks that the customer could consider instead of Volvo trucks.[29] Once Volvo determined the price concessions, the dealer established the customer's retail price.[30] If the customer accepted the dealer's retail price, then the dealer purchased the trucks from Volvo.[31]

Volvo had 146 authorized dealers during its alleged period of price discrimination.[32] During that time, Volvo enacted the "Volvo Vision," which was the automaker's plan to reduce the number of Volvo dealers to seventy-five.[33] For various reasons, Reeder feared being one of the dealers facing elimination.[34] After the announcement of the "Volvo Vision," Reeder noticed that Volvo increased Reeder's sales objectives while contemporaneously decreasing Reeder's price concessions.[35]

Reeder took measures to prevent termination by Volvo, but in 1999, Volvo issued Reeder a termination letter.[36] Since the enactment of the "Volvo Vision," Reeder had gone from a top-performing dealer earlier in the decade to one of Volvo's worst performing dealers by 1999.[37] Reeder believed that its declining success and eventual termination resulted from Volvo's discriminatory pricing practices.[38]

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25. Reeder-Simco v. Volvo, 374 F.3d. 701, 704 (8th Cir. 2004).
26. Brief for the Respondent, *supra* note 23, at 6.
27. *Id.* at 7.
28. *Id.* at 8–9.
29. *Id.* at 9.
30. *Id.* at 7.
31. *Id.*
32. Brief for the Respondent, *supra* note 23, at 6.
33. Reeder-Simco v. Volvo, 374 F.3d 701, 705 (8th Cir. 2004).
34. *Id.* Reeder learned that Volvo was offering other Volvo dealers higher price concessions from faxes mistakenly sent by Volvo to Reeder. *Id.*
35. *Id.*
36. *See* Brief for the Respondent, *supra* note 23, at 12–13.
37. *Id.* Historically, Reeder had significant success in the Class 8 market, being honored as one of Volvo GM's top dealers in 1992. *Id.* at 5.
38. *See id.* at 13.

B. Reeder's Claim Against Volvo

To prove price discrimination, Reeder focused on three factual scenarios: (1) instances of differing price concessions when Reeder competed directly against another Volvo dealer, (2) instances in which Reeder bid successfully when Volvo offered non-competing dealers higher price concessions, and (3) instances in which Reeder bid unsuccessfully when Volvo offered non-competing dealers higher price concessions.[39]

First, Reeder presented evidence of instances in which Volvo offered other Volvo dealers higher price concessions despite a company policy of granting competing dealers the same concession.[40] In one transaction, Volvo offered one of Reeder's competitors a seven and one-half percent price concession; however, the customer did not accept the bid and asked Reeder to submit a bid.[41] Volvo granted Reeder the same price concession, but Reeder's bid was higher than the competitor's due to an overall price increase for the truck model in question.[42] After the customer agreed to buy the trucks from Reeder's competitor, Volvo increased the price concession to offset the price increase between the time the bid was originally prepared and the time the bid was accepted.[43] In a separate transaction, Reeder and another Volvo dealer had independent contracts with the same customer, yet the competitor received a higher price concession from Volvo on its contract than Reeder had received on its contract.[44]

Second, Reeder presented evidence of instances in which Volvo offered non-competing dealers different price concessions on the sale of trucks of like grade and quality.[45] As a result of the differing price concessions, Reeder's sales of similar trucks were less profitable than the sales of other Volvo dealers.[46]

Finally, Reeder presented evidence of instances in which Volvo did not grant Reeder's requested price concession, and Reeder subsequently lost the sale.[47] During this same period, however, Volvo granted other Volvo dealers higher price concessions, and those dealers were able to complete the sale.[48]

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39. *See* Reeder-Simco v. Volvo, 374 F.3d 701, 705–06 (8th Cir. 2004).
40. Brief for the Respondent, *supra* note 23, at 13–14.
41. *Id.* at 14.
42. *Id.*
43. *See id.* A Volvo representative testified at trial that Volvo did not offer higher concessions simply because the dealer and customer previously agreed on a price. *Id.*
44. *Id.* at 15.
45. *See* Reeder-Simco v. Volvo, 374 F.3d 701, 706 (8th Cir. 2004).
46. *Id.*
47. *Id.*
48. *Id.*

Reeder believed that Volvo's pricing practices caused its declining profits and sales.[49] As a result, Reeder commenced legal action against Volvo, alleging that Volvo's pricing practices violated the Robinson-Patman Act.[50] Reeder filed suit in the United States District Court for the Western District of Arkansas, and a jury awarded Reeder $1.3 million in damages, which the trial court trebled.[51] Volvo appealed the district court's judgment to the Eighth Circuit Court of Appeals.[52]

C. The Eighth Circuit's Opinion

The Eighth Circuit Court of Appeals affirmed a jury verdict awarding Reeder $1.3 million for Volvo's Robinson-Patman Act violation.[53] The court of appeals believed that Reeder was engaged in competition with all other Volvo dealers because Volvo dealers were authorized to sell trucks outside of their geographic area.[54] The court held that Reeder presented sufficient evidence "for the jury to conclude Volvo's discriminatory concessions resulted in lost profits and sales to Reeder."[55] Furthermore, the court held that Reeder presented sufficient information for the jury to conclude that Volvo's pricing practices caused actual injury to Reeder.[56] Displeased with the result, Volvo filed a writ of certiorari with the United States Supreme Court, seeking a reversal of the Eighth Circuit's ruling.[57]

III. BACKGROUND

Price discrimination occurs when a seller realizes a different rate of return on the sale of two or more products.[58] Congressman Wright Patman believed that price discrimination threatened the independent merchant, and by extension, the public at large.[59] Ultimately, Congress agreed with Con-

49. Volvo v. Reeder-Simco, 126 S. Ct. 860, 866 (2006).
50. *Id.*
51. *Reeder-Simco*, 374 F.3d at 707.
52. *Id.*
53. *Volvo*, 126 S. Ct. at 868.
54. *Reeder-Simco*, 374 F.3d at 709.
55. *Id.* at 711.
56. *See id.*
57. *See* Reply Brief for Petitioner at 20, Volvo v. Reeder-Simco, 126 S. Ct. 860 (2006) (No. 04-905).
58. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 565 (2d ed. 1999). Rate of return is defined as the ratio of price to marginal cost. *Id.* As a result, price discrimination does not occur when the same product is sold at a different price, provided the price difference is commensurate with the difference in marginal cost. *Id.* The same product can have different marginal cost for various reasons, such as the cost associated with having to fulfill the differing needs of two different customers. *Id.*
59. *See* WRIGHT PATMAN, THE ROBINSON-PATMAN ACT 3 (The Ronald Press Co. 1938).

gressman Patman and passed the Robinson-Patman Act.[60] The Robinson-Patman Act explicitly prohibits sellers from engaging in price discrimination "between different purchasers of commodities of like grade and quality . . . [when] the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition," provided that the price difference is not attributable to a difference in cost or an attempt to match a competitor's price.[61] Any person who is injured because of price discrimination can sue in federal court and recover treble damages in addition to attorney's fees and other related litigation expenses.[62] In order for a plaintiff to have a successful Robinson-Patman claim, the plaintiff must establish (1) the sales were made in interstate commerce, (2) the items sold were of like grade and quality, (3) the seller discriminated in price, and (4) the price discrimination injured competition.[63]

Courts have recognized three categories of competitive injury that generally give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line price discrimination.[64] Primary-line price discrimination occurs when a discriminating seller uses predatory pricing[65] to adversely affect the discriminating seller's competition.[66] Secondary-line price discrimination arises when a seller offers the same product at a different price to competitors in the same market, thereby injuring competition among the discriminating seller's customers.[67] Tertiary-line price discrimination results when a seller discriminates to the detriment of competition among the purchaser's customers.[68]

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60. Senator Joseph Robinson introduced the bill in the Senate. FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 12 (Little, Brown & Co. 1962). Senator Robinson served Arkansas as a congressman, governor, and senator. Biographical Directory of the United States Congress, Joseph Taylor Robinson, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000347 (last visited Nov. 2, 2006). Senator Robinson was the Democratic nominee for Vice President in 1928, and from 1933–1937 Senator Robinson served as the majority leader of the Senate. *Id.* Congressman Wright Patman introduced the bill in the House of Representatives. ROWE, *supra*, at 12. Congressman Patman represented the district comprising North-East Texas from March 1929 until his death in March 1976. Biographical Directory of the United States Congress, John William Wright Patman, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=p000103 (last visited on Nov. 2, 2006).

61. 15 U.S.C. § 13(a) (2006).

62. Suits by Persons Injured, 15 U.S.C. § 15 (2006).

63. *See* Texaco v. Hasbrouck, 496 U.S. 543, 556 (1990).

64. Volvo v. Reeder-Simco, 126 S. Ct. 860, 870 (2006).

65. Predatory pricing occurs when a product is offered at a price below the product's marginal cost. *See* HOVENKAMP, *supra* note 58, at 360.

66. *See id.* at 574.

67. *Id.*

68. *Volvo*, 126 S. Ct. at 870.

Volvo involved a claim of secondary-line price discrimination.[69] To understand secondary-line price discrimination and the significance of the Supreme Court's decision in *Volvo*, this section will analyze (1) the legislative history of the Robinson-Patman Act,[70] (2) the economic ramifications of the Act,[71] and (3) the evolution of price discrimination in key Supreme Court decisions.[72]

A. Legislative History of the Robinson-Patman Act

The purpose of the Robinson-Patman Act is to protect the independent merchant and the public that the merchant serves.[73] At the turn of the twentieth century, American business consisted of manufacturers, wholesalers, and retailers.[74] Wholesalers purchased manufactured goods, selling them to retailers who, in turn, sold the goods to the public.[75] This trend continued until after World War I when grocery chain stores began to experience rapid growth.[76]

Chain stores focused on integrating the wholesale and retail functions of the business model in order to circumvent paying the wholesaler's profit margin.[77] In addition to the integrated business model, chain stores used centralized purchasing departments to obtain price concessions from manufacturers that independent retailers were unable to obtain.[78] Ultimately, the integrated business model and centralized purchasing system allowed chain stores to revolutionize the American business model.[79]

By 1933, chain stores accounted for twenty-five percent of grocery retail sales, up from nine percent in 1926.[80] During that same period, independent grocers were going out of business at a rate of ten percent per year.[81] The Clayton Act made price discrimination an antitrust violation,[82] but independent merchants had no legal recourse under that Act.[83] The Clayton Act was ineffective at combating secondary-line price discrimination because it

69. *Id.*
70. *See infra* Part III.A.
71. *See infra* Part III.B.
72. *See infra* Part III.C.
73. PATMAN, *supra* note 59, at 3.
74. ROWE, *supra* note 60, at 3.
75. *Id.*
76. *Id.* at 4.
77. *Id.*
78. *Id.*
79. *Id.*
80. ROWE, *supra* note 60, at 5.
81. *Id.*
82. Clinton C. Carter & Kesa M. Johnston, *The Robinson-Patman Act: The Law of Price Discrimination*, 64 ALA. LAW. 246, 247 (2003).
83. *Id.*

allowed a seller to offer a different price based on the quantity of goods sold.[84] Moreover, the Clayton Act covered only competition among sellers, not among buyers.[85]

Independent merchants and politicians began to organize against the chain-store merchants, namely the Great Atlantic and Pacific Tea Company (A & P).[86] As resentment toward the chain stores continued to escalate, both federal and state governments began to draft legislation to inhibit the growth of chain stores.[87] These legislative attempts ultimately proved ineffective, and a congressional commission concluded that the chain stores would continue to grow as long as they continued to offer significantly lower prices than independent merchants.[88]

Originally offered as the "Wholesale Grocers Protection Act,"[89] Congress enacted the Robinson-Patman Act as an amendment to the Clayton Act amid concerns that a bill that targeted only the grocery industry would be constitutionally vulnerable.[90] The bill amended the Clayton Act to (1) unconditionally prohibit price discrimination in interstate commerce and (2) limit the offering of quantity discounts.[91] Moreover, the bill added a clause that prohibited price discrimination that adversely affected a competitor's ability to compete with a person or his customers who received or granted a discriminatory price.[92] The Senate added this language because the original language, requiring a competitor to show "general injury to competitive conditions," was too restrictive and failed to protect the competitor injured by discriminatory pricing.[93]

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84. *Id.* at 248.

85. *Id.*

86. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1122 (1983). Independent merchants attempted to wage economic warfare against the chain stores by trying to coerce manufacturers not to deal directly with chain stores. *See* ROWE, *supra* note 60, at 5–6. These attempts proved unsuccessful because the courts deemed the independent merchants' actions anticompetitive. *Id.*

87. ROWE, *supra* note 60, at 8. States began passing legislation that heavily taxed chain stores or even prohibited chain stores from operating within the state. *Id.* At the federal level, Congressman Patman continued his pursuit of chain stores after the Robinson-Patman Act was enacted, offering first in 1938 and again in 1940 a punitive tax on chain stores that would have resulted in A & P paying $524 million dollars in federal taxes on $9 million dollars of net income. Roy G. Blakey & Gladys C. Blakely, *Chain Store Taxation*, 19 TAXES 594, 628 (1941).

88. ROWE, *supra* note 60, at 9.

89. Hansen, *supra* note 86, at 1123.

90. ROWE, *supra* note 60, at 23. H.B. Teegarden, counsel for the United States Wholesale Grocers Association, drafted the bill originally offered in the House by Congressman Patman. *Id.* at 11. Ironically, with the exception of the food industry and retail druggist, every other important business segment opposed the bill. *Id.* at 22.

91. *Id.* at 12.

92. *Id.* at 14.

93. Hansen, *supra* note 86, at 1123–24.

Facing strong resentment toward chain stores and minimal opposition, the bill easily passed the House.[94] It faced growing opposition in the Senate, which resulted in several amendments designed to weaken the bill before the Senate ultimately passed the bill.[95] However, once the bill reached the House-Senate conference, the differences between the House and Senate bill were reconciled in favor of the original Patman bill, and President Roosevelt signed the bill into law on June 19, 1936.[96]

B. The Economic Ramifications of the Robinson-Patman Act

According to Robert Bork, "no other antitrust statute has been subjected to so steady a barrage of hostile commentary as the Robinson-Patman Act."[97] The statute faced public attack from the Justice Department during the 1970s when the Department sought to have the Robinson-Patman Act repealed.[98] Although the Justice Department's efforts to repeal the Act were unsuccessful, the Justice Department continues not to enforce the Act.[99] According to Robert Bork, hostile criticism toward the Act is justified because the goal of the Robinson-Patman Act is to protect competitors, even though antitrust statutes are designed to protect competition.[100]

Theorists believe that price discrimination should be encouraged when it is attributable to differences in marginal cost because price should be a function of marginal cost.[101] Ultimately, sellers should sell their products at a price equal to marginal cost, thereby optimizing consumer welfare and allocative efficiency.[102] Under the Robinson-Patman Act, however, sellers must offer a uniform price; otherwise, the seller may be guilty of price discrimination.[103] Although the Act allows a seller to escape liability when the price difference is attributable to cost, the threat of costly litigation inhibits sellers from offering different prices.[104] As a result, prices remain stagnant, and sellers are unable to adjust prices for changes in market conditions.[105]

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94. ROWE, *supra* note 60, at 18.

95. *Id.* at 17.

96. *Id.* at 19.

97. ROBERT H. BORK, THE ANTITRUST PARADOX 385 (Free Press 1993) (1978). One critic has viewed Bork's book as an attempt to persuade courts to use economic theory as the basis for resolving antitrust disputes, rather than relying on congressional intent. David F. Shores, *Economic Formalism in Antitrust Decision Making*, 68 ALB. L. REV. 1053, 1093 (2005).

98. Hansen, *supra* note 86, at 1115–16.

99. *See id.* at 1116.

100. BORK, *supra* note 97, at 394.

101. *See* Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 GEO. L.J. 1157, 1161 (1983).

102. *Id.*

103. *See* BORK, *supra* note 97, at 383.

104. *Id.* at 389.

105. *Id.* at 388.

Although supporters of the Robinson-Patman Act believe price discrimination would allow powerful chain stores to gain a competitive advantage over independent merchants,[106] some academics believe sporadic price discrimination is a sign of healthy competition.[107] Theoretically, large chain stores are not able to obtain unjustified discounts because the discounts are available only if the seller offers the product at a price above marginal cost.[108] A seller cannot reduce price below marginal cost because the price of the product would not cover the cost of the product, thereby causing the seller to go out of business.[109] By requiring discount prices, the chain store will move the price of the product toward marginal cost,[110] which, according to some, is an indication of perfect competition.[111]

In order to compete with the discriminating seller, a competitor must lower its prices, which then leads to a series of retaliatory price reductions, reducing prices for everyone.[112] Larger purchasers do not have exclusive access to discount purchasing because the smaller purchasers can band together to negotiate for lower prices.[113] If the seller continues to charge the smaller purchasers with unjustifiably high prices, then the smaller purchasers will find a different seller.[114] Therefore, it is theoretically improbable that price discrimination injures competition between the seller's customers.[115]

According to Bork, the Robinson-Patman Act is fundamentally flawed because it equates price differential with price discrimination.[116] However, the drafters of the Act did not intend mere price differences to create a recognizable injury under the Act.[117] Contrary to the drafters' position, in *Federal Trade Commission v. Morton Salt*,[118] the Supreme Court interpreted

106. *See supra* Part III.A.

107. Hovenkamp, *supra* note 101, at 1170.

108. *See* BORK, *supra* note 97, at 389.

109. Hovenkamp, *supra* note 101, at 1170. The seller would not be able to make up for the difference in cost by charging higher prices elsewhere because the consumers in the different market would not be willing to buy a product at a price above marginal cost. *See* BORK, *supra* note 97, at 386.

110. *See* BORK, *supra* note 97, at 390.

111. Hovenkamp, *supra* note 101, at 1170.

112. *See* BORK, *supra* note 97, at 390.

113. *Id.*

114. Hovenkamp, *supra* note 101, at 1170.

115. BORK, *supra* note 97, at 390.

116. *Id.* at 399. Price discrimination results when the seller realizes a different ratio of price to marginal cost on sales to different purchasers of the same product. *Id.* at 383. Thus, if a seller offers different prices proportionate to different costs, then the seller is not engaging in price discrimination. *Id.* Conversely, if a seller offers a product at a constant price (in spite of cost differences), then the seller is engaging in discriminatory pricing. *Id.*

117. Andrew I. Gavil, *Secondary-Line Price Discrimination and the Fate of* Morton Salt*: To Save It, Let It Go*, 48 EMORY. L.J. 1057, 1077 (1999).

118. 334 U.S. 37, 45 (1948).

"price discrimination" to mean a price difference.[119] The fundamental economic flaw behind the Robinson-Patman Act is a prohibition on offering different prices; however, this flaw resulted from judicial interpretation, not from the statutory text.[120]

C. Judicial Development of the Robinson-Patman Act

Hundreds of thousands of pricing decisions are affected every year because of the Robinson-Patman Act.[121] The Act prohibits discriminatory pricing that *may* injure, destroy, or prevent competition.[122] This section will explore three Supreme Court cases that interpreted the Robinson-Patman Act's injury requirement: *Federal Trade Commission v. Morton Salt Co.*,[123] *J. Truett Payne Co. v. Chrysler Motors Corp.*,[124] and *Texaco Inc. v. Hasbrouck*.[125]

1. *The* Morton Salt *Inference of Price Discrimination*

In *Federal Trade Commission v. Morton Salt*, a large manufacturer of table salt offered buyers a lower price per case when the buyer bought more than a predetermined amount of salt during any consecutive, twelve-month period.[126] Although these discounts were available to all of Morton's customers, only five companies purchased enough salt to take advantage of the discounted price.[127] After investigating Morton's quantity-discount pricing, the Federal Trade Commission issued a cease and desist order, compelling Morton to discontinue the quantity-discount pricing.[128] The Court determined that Morton violated the Robinson-Patman Act's prohibition of price discrimination based upon the commissioner's showing that Morton charged one customer a higher price than what was charged to one of the customer's competitors.[129]

The Court recognized that, in theory, the standard discounts offered by Morton were available to all purchasers, not just to favored purchasers com-

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119. *Id.*
120. *See* Gavil, *supra* note 117, at 1063.
121. BORK, *supra* note 97, at 384.
122. 15 U.S.C. § 13(a) (2000).
123. *See infra* Part III.C.1.
124. *See infra* Part III.C.2.
125. *See infra* Part III.C.3.
126. FTC v. Morton Salt, 334 U.S. 37, 41 (1948).
127. *Id.* The Great Atlantic & Pacific Tea Company was one of the stores capable of utilizing the quantity discounts. *Id.*
128. *See id.* at 40.
129. *Id.* at 45.

peting with disfavored purchasers.[130] Despite this fact, the record indicated that no individual merchant had purchased enough table salt to utilize Morton's standard discounts.[131] As the Court noted, the legislative history of the Robinson-Patman Act showed that the purpose of the Act was to prevent a large purchaser from obtaining favorable pricing discounts solely because of the large buyer's ability to purchase large quantities.[132] As a result, the Court determined that Morton's standard pricing practices were discriminatory under the Robinson-Patman Act.[133]

Furthermore, the Court held that the Robinson-Patman Act does not require that price discrimination in fact harm competition; rather, it requires that price discrimination create a reasonable possibility of injury to competition.[134] The Court believed that it was "self-evident . . . that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers."[135] According to the Court, in order to establish an injury to competition under the Robinson-Patman Act, a party simply has to show that a manufacturer's price differential resulted in a substantially lower resale price among competitors.[136]

In *Morton Salt,* the Court relied in part on the legislative history to hold that Morton injured competition and engaged in prohibited price discrimination by offering different purchasers substantially different prices for like goods.[137] Some commentators have argued that this inference, referred to as the "*Morton Salt* inference," furthers Congress's prophylactic intent in passing the Robinson-Patman Act.[138] However, a plaintiff must still prove more than the *Morton Salt* inference in order to recover damages under the Act.[139]

2. J. Truett Payne Co. v. Chrysler Motors Corp.: *Limiting the Application of the* Morton Salt *Inference*

In *J. Truett Payne Co. v. Chrysler Motors Corp.*, a new and used automobile dealer alleged that Chrysler engaged in price discrimination by holding J. Truett Payne to a higher automobile sales objective than Payne's

130. *Id.* at 42.
131. *Id.*
132. *Morton*, 334 U.S. at 43.
133. *Id.* at 44.
134. *Id.* at 46.
135. *Id.* at 50.
136. *See id.* at 46–47.
137. *Id.* at 45.
138. Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634, 634 (1992).
139. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

competitors.[140] Chrysler offered dealers a cash-back bonus for every vehicle the dealer sold in excess of a predetermined sales objective.[141] Payne argued that Chrysler's sales objective program was a form of price discrimination because competitor-dealers received a lower price on vehicles from Chrysler to the extent that they had a lower sales objective.[142] Payne further contended that he was entitled to automatic damages to the extent that he proved price discrimination.[143] Although Payne failed to establish a cognizable injury, Payne argued that the jury should be able to infer injury in a civil case, similar to how injury is inferred in an injunctive suit.[144]

The Court rejected Payne's argument and declined to extend the *Morton Salt* inference to private suits involving monetary damages.[145] In order for a plaintiff to recover treble damages, the plaintiff must show that an actual injury resulted from an activity prohibited by the antitrust laws.[146] A mere showing of price discrimination under the Robinson-Patman Act is insufficient because it establishes only that an injury *may* result, not that an injury *did* result.[147]

In *J. Truett Payne*, the Court recognized that the *Morton Salt* inference gives rise to a Robinson-Patman violation, but it declined to extend this inference to private parties seeking treble damages.[148] From here, the Court began to limit the *Morton Salt* inference as it applied to Robinson-Patman allegations.[149]

3. Texaco Inc. v. Hasbrouck*: Further Limitations on the* Morton Salt *Inference*

In upholding a secondary-line price discrimination suit against Texaco, the Court recognized that the *Morton Salt* inference is inapplicable in cases involving functional discounts.[150] Texaco sold gasoline to independent retailers and gasoline distributors.[151] The gasoline distributors picked up the gasoline from Texaco's plant, while Texaco delivered the gasoline to the

140. *Id.* at 560.
141. *Id.*
142. *Id.*
143. *Id.* at 561.
144. *Id.*
145. *J. Truett Payne*, 451 U.S. at 561.
146. *Id.* at 562.
147. *Id.*
148. *Id.* at 561.
149. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 571 (1990).
150. *Id.* A functional discount is offered to a wholesaler due to the wholesaler's function in the distribution chain. Ballan, *supra* note 138, at 643.
151. *Texaco*, 496 U.S. at 547–48.

independent retailers.[152] As a result, the gasoline distributors received a cheaper price for gasoline than the independent retailers.[153]

The Court reasoned that when a seller offers a reduction in price as a functional discount, the seller no longer has the burden of proving a cost-justification defense.[154] Whereas a cost-justification defense requires the seller to prove that the difference in price is warranted, the plaintiff must prove that a competitive injury occurred when a seller offered a functional discount.[155] In *Texaco*, the Court upheld Hasbrouck's price discrimination claim because Hasbrouck was able to present sufficient evidence to prove the illegitimacy of Texaco's functional discounts.[156]

The Court recognized, however, that anticompetitive effects could not be presumed in the case of functional discounts because most functional discounts are legitimate and do not harm competition.[157] Indeed, as the Court observed, most functional discounts simply resemble a reimbursement for the functional cost assumed by the wholesaler.[158] Although courts should assume functional discounts are legitimate, the Robinson-Patman Act prohibits discounts when a plaintiff proves the discounts have anticompetitive effects.[159] In *Texaco*, the Court continued to limit the applicability of the *Morton Salt* inference, a trend the Court continued in *Volvo*.[160]

IV. REASONING

On January 10, 2006, the Supreme Court reversed the Eighth Circuit's decision in *Reeder-Simco v. Volvo* and remanded the case to the district court for further proceedings.[161] Justice Ginsburg delivered the opinion of the court.[162] She was joined by Chief Justice Roberts and Justices Breyer, Kennedy, O'Connor, Scalia, and Souter.[163] Justice Stevens, joined by Justice Thomas, filed a dissenting opinion.[164] This section will first analyze Justice

152. *Id.* at 549.
153. *Id.*
154. *Id.* at 561. The Court recognized that although the Robinson-Patman Act allows a seller to offer a cost justification defense (that is, difference in price is commensurate with the difference in cost), the defense is difficult to prove as a practical matter and is often unsuccessful. *Id.* at 561 n.18.
155. *Id.*
156. *Id.* at 570.
157. *Texaco*, 496 U.S. at 571.
158. *Id.*
159. *Id.*
160. 126 S. Ct. 860, 870 (2006).
161. *Id.* at 873.
162. *Id.* at 866.
163. *Id.* at 865.
164. *Id.*

Ginsburg's majority decision[165] and then Justice Stevens's dissenting opinion.[166]

A. Justice Ginsburg's Majority Opinion

Justice Ginsburg began her opinion by briefly explaining the facts of the case, the decision of the lower court, and the Court's holding.[167] The Court determined that Reeder did not have a valid claim under the Robinson-Patman Act because competition among bidders for special order products is not the type of competition protected by the Act.[168]

After her brief announcement of the Court's holding, Justice Ginsburg gave an overview of the facts and issues of the case and then an overview of the Robinson-Patman Act.[169] In the next section, the Court analyzed the facts of the case vis-à-vis the requirements necessary to recover under the Robinson-Patman Act.[170] Justice Ginsburg concluded the majority opinion by juxtaposing Reeder's case with the theoretical concerns of antitrust laws.[171]

1. *Issues*

Justice Ginsburg framed the issue as whether a manufacturer can "be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer."[172] Resolving the issue in the negative, Justice Ginsburg's analysis began by outlining the purpose and requirements of the Robinson-Patman Act.[173]

2. *The Robinson-Patman Act*

Justice Ginsburg noted that Congress designed the Robinson-Patman Act to prevent large chain stores from obtaining lower prices than smaller buyers.[174] According to Ginsburg, the Robinson-Patman Act was not designed to prevent all price differences; rather, it was intended to prevent

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165. *See infra* IV.A.
166. *See infra* IV.B.
167. *See Volvo*, 126 S. Ct. at 866.
168. *Id.* The Court recognized that Reeder did have a valid state law claim. *Id.* However, this note is focusing solely on the Robinson-Patman Act issue. *See supra* note 19.
169. *See Volvo*, 126 S. Ct. at 866–70.
170. *See id.* at 870–72.
171. *See id.* at 872–73.
172. *Id.* at 869.
173. *Id.* at 869–70.
174. *Id.* at 869.

price discrimination that threatened or injured competition.[175] Generally, courts have recognized three types of price discrimination: primary-line, secondary-line, and tertiary-line.[176] The Court noted that Reeder's case involved secondary-line price discrimination.[177]

In order to show secondary-line price discrimination, Reeder was required to show that (1) the truck sales occurred in interstate commerce, (2) "the trucks were of 'like grade and quality,'" (3) Volvo offered discriminatory prices among Reeder and other Volvo purchasers, and (4) the price discrimination injured competition.[178] Although it was undisputed that Reeder satisfied the first two requirements, the third and fourth requirements remained at issue.[179]

The threshold inquiry in resolving whether an injury to competition has occurred is whether sales and profits have been diverted from the disfavored purchaser to a favored purchaser.[180] Although courts can infer an injury to competition when a favored purchaser receives a substantially lower price for a long period, the court cannot infer the requisite injury if the favored and disfavored purchasers were not direct competitors.[181]

3. *Reeder's Case*

Although the Eighth Circuit concluded that Reeder presented sufficient evidence that Volvo's pricing practices resulted in competitive injury, the Supreme Court concluded that Reeder's evidence did not prove the type of injury prohibited by the Robinson-Patman Act.[182] Even though Reeder offered three scenarios of competitive injury, Justice Ginsburg analyzed Reeder's evidence in two categories: (1) discrimination among non-competing dealers and (2) discrimination between competing dealers.[183]

a. Discrimination among non-competing dealers

First, Reeder's evidence of price discrimination between non-competing Volvo dealers was insufficient because Reeder was not directly competing with other dealers for the same customers.[184] Instead, Reeder's evidence showed that Volvo offered different prices to different dealers

175. *Volvo*, 126 S. Ct. at 870.
176. *Id.*; *see also* discussion *supra* Part III.
177. *Volvo*, 126 S. Ct. at 870.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 871.
183. *Volvo*, 126 S. Ct. at 871.
184. *Id.*

competing for different customers.[185] Given Reeder's evidence, the Court declined to infer competitive injury because the evidence did not prove that a favored dealer was capable of manipulating the market to the detriment of the disfavored purchaser.[186]

In Reeder's case, a favored purchaser could not manipulate the market to harm a disfavored purchaser because the two purchasers were not competing against each other.[187] Although Volvo dealers may sell outside of their geographic area, this does not mean that the dealers competed against each other for specific customer sales.[188]

Instead, Volvo dealers competed against each other for the opportunity to bid on a particular customer's business.[189] Volvo's pricing practices could not injure competition for the opportunity to bid because Volvo did not offer a price concession until after the dealer was awarded the opportunity to bid.[190] Once a dealer began the competitive bidding process, the market became isolated to a particular customer, with only a few dealers competing for the sale.[191] An inference of competitive injury, however, arises only when there is evidence of substantial discrimination between competing purchasers.[192] Thus, competitive injury could not be inferred in Reeder's case because Reeder and another Volvo dealer did not compete for the same customer's business.[193]

b. Discrimination among competing dealers

Even if Reeder did compete against other Volvo dealers for the same customer, the Court still could not infer competitive injury because Reeder failed to establish being disfavored for a substantial period as compared to other Volvo dealers.[194] In one instance, Reeder lost a deal that would have resulted in $30,000 of gross profit.[195] In another instance, neither Reeder nor the dealer who received the higher price concession won the customer's business.[196] Thus, according to the Court, even if Volvo engaged in price

185. *Id.*
186. *See id.* Furthermore, the Court noted that Reeder's evidence led to the possibility that situations could have existed in which Reeder was the favored purchaser. *Id.*
187. *Id.*
188. *Id.*
189. *Volvo*, 126 S. Ct. at 871.
190. *Id.*
191. *Id.*
192. *Id.* at 872.
193. *See id.*
194. *Id.*
195. *Volvo*, 126 S. Ct. at 872.
196. *Id.*

discrimination, the price discrimination did not substantially affect competition between Reeder and other Volvo dealers competing for the same sale.[197]

4. *Reeder's Case and the Broader Purposes of Antitrust Laws*

In rejecting Reeder's Robinson-Patman Act claim, the Court continued to interpret the Act consistently with the purpose of antitrust laws.[198] According to the Court, Reeder's interpretation of the Act was not in accord with the broader goals of antitrust laws because it protected competitors rather than stimulating competition.[199] Volvo's pricing practices, however, were in accord with the broader goals of antitrust laws because the pricing practices stimulated competition among different suppliers.[200] Although Justice Ginsburg concluded that the Court's holding in *Volvo* furthered the broader antitrust policies,[201] the dissenting justices believed that it abandoned the statutory text of the Robinson-Patman Act.[202]

B. Justice Stevens's Dissenting Opinion

Justice Stevens began his dissenting opinion by arguing that the Robinson-Patman Act protected franchise dealers from price discrimination regardless of whether the franchise dealers competed against one another.[203] He concluded that the Robinson-Patman Act should have protected Reeder from price discrimination in this case.[204]

Justice Stevens's Robinson-Patman analysis relied on two uncontested findings of the trial court: (1) that Volvo engaged in price discrimination and (2) that Reeder and other Volvo dealers were competitors.[205] Ever since *Morton Salt*, juries have inferred competitive injury under the Robinson-Patman Act when a manufacturer offered one purchaser a lower price than a competing purchaser.[206] Moreover, courts have recognized that distributors in a single retail market are competitors with other distributors.[207] Applying

197. *Id.* The Court declined the opportunity to determine if the Robinson-Patman Act applied to instances of head-to-head competition; rather, the Court assumed the Act applied to such situations. *Id.*
198. *Id.* at 873.
199. *Id.* at 872.
200. *See id.*
201. *Volvo*, 126 S. Ct. at 873.
202. *See id.* at 876 (Stevens, J., dissenting).
203. *Id.* at 873.
204. *Id.*
205. *See id.*
206. *Id.* at 875.
207. *See Volvo*, 126 S. Ct. at 875.

these principles, the Court should have affirmed the Eighth Circuit's decision.[208]

According to Justice Stevens, Reeder presented sufficient evidence that Volvo charged Reeder higher prices over a long period and that these higher prices inhibited Reeder's ability to compete with other purchasers.[209] Justice Stevens believed that this was enough to establish injury to competition because neither the statute nor the Court's precedent required an injury to competition on a transactional basis.[210]

A transactional approach to determining competitive injury requires a disfavored purchaser to compete directly against a favored purchaser for the same sale.[211] In Justice Stevens's opinion, Justice Ginsburg ignored the *Morton Salt* inference by making direct competition a prerequisite to recover under the Robinson-Patman Act.[212] Under *Morton Salt*, courts can infer competitive injury when a purchaser lost profits relative to a competitor, but in this case, Justice Ginsburg negated this inference absent head-to-head competition.[213] As a result, Justice Stevens concluded that Justice Ginsburg gave "short shrift to the Robinson-Patman Act's prophylactic intent," and in the process, abandoned the statutory text of the Act.[214]

V. SIGNIFICANCE

In *Volvo*, the Court denied Reeder's Robinson-Patman claim because Reeder failed to establish that Volvo's pricing practices substantially injured competition between Reeder and a direct competitor.[215] Had the Court followed *Morton Salt*'s sole directive, the Court would have inferred the requisite injury due to the different prices offered among various Volvo dealers.[216] The Court would have inferred the injury regardless of whether Reeder directly competed against the other Volvo dealers.[217] Under *Volvo*, however, a plaintiff must prove that a manufacturer substantially injured competition by offering purchasers competing for the same sale different prices.[218] This is significant because the Court narrowed the application of the Robin-

208. *See id.*
209. *Id.*
210. *Id.* at 876.
211. *Id.*
212. *Id.*
213. *See Volvo*, 126 S. Ct. at 876.
214. *Id.* While Justice Stevens admitted that the Robinson-Patman Act was not sound economic policy, he still believed the particular facts of this case warranted enforcement of the Act. *Id.*
215. *See id.* at 872.
216. *See* discussion *supra* Part III.C.1.
217. *See* discussion *supra* Part III.C.1.
218. *See* discussion *supra* Part IV.A.3.b.

son-Patman Act by requiring a plaintiff to prove more than the *Morton Salt* inference.[219]

Arguably, the legislative branch should have the task of narrowing the application of the Robinson-Patman Act;[220] however, the Supreme Court correctly narrowed the Act in *Volvo* for two reasons. First, the broad application of the Robinson-Patman Act was the result of flawed judicial interpretation, not the statute's language.[221] Second, strong public resentment toward large corporations makes legislative action unlikely.[222] This section examines both reasons to show why the Supreme Court reached the correct result in *Volvo*. The next part analyzes the soundness of having the judiciary correct unsound antitrust policy.

A. Correcting Previous Judicial Interpretations

In deciding *Morton Salt*, the Court declared that a substantial price difference among purchasers sufficiently established an injury to competition.[223] However, the Court's declaration directly contradicted the plain language of the statute and the legislative intent behind the statute.[224] The Robinson-Patman Act explicitly prohibits price discrimination, but judicial interpretation has construed price discrimination to mean price differential.[225] By definition, price discrimination requires a seller to realize a different rate of return on the sale of the same product to different purchasers.[226] Conversely, price differential results when a seller offers a product at a different price.[227]

The drafters of the Robinson-Patman Act sought to prohibit price discrimination out of fear that large chain stores would coerce distributors to accept lower profit margins in exchange for a higher volume of sales.[228] Although differential pricing can result in lower profit margins, it does not necessarily do so.[229] If a seller offers a product at a different price due to a different cost, then the seller has not discriminated in price because the prof-

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219. *See* Zwisler, *supra* note 7, at 43 (discussing how the Court's decision will further limit the number of cases brought under the Robinson-Patman Act).

220. *Id.*

221. *See* Gavil, *supra* note 117, at 384.

222. Hansen, *supra* note 86, at 1117.

223. *See* discussion *supra* Part III.A.

224. *See* discussion *supra* Part III.A (discussing the statutory text of the Act and the drafters' intent in drafting the Act).

225. *See* discussion *supra* Part III.B.

226. *See* discussion *supra* Part III.B.

227. *See* discussion *supra* Part III.B.

228. *See* discussion *supra* Part III.A.

229. *See supra* note 116.

it margin remains the same.[230] Conversely, if the seller offers a product at the same price regardless of the cost involved, then the seller is engaging in price discrimination because the profit margin has changed.[231] By interpreting the Robinson-Patman Act to prohibit price differential rather than price discrimination, the *Morton* Court simply misapplied the Act.[232]

Although Congressional action could have corrected the judiciary's mistake in *Morton Salt*, there was no impetus for Congress to act.[233] The United States Justice Department has not enforced the Act since 1975,[234] and plaintiffs have had increasing difficulty prevailing under the Act in civil suits.[235] Due to the Act's sparse enforcement, there has been no incentive for the legislature to repeal it.[236]

Although the legislature did not have an incentive to narrow the broad application of the Robinson-Patman Act, the Court did have an incentive to narrow the application of the Act. The breadth of the Act was the result of the Court's decision in *Morton Salt*, not the statutory text.[237] Thus, it was appropriate for the Court to limit *Morton Salt* so that the Act prohibits true secondary-line price discrimination among direct competitors, not simple price differentiation.[238] Although an amendment to the Robinson-Patman Act is one method to limit *Morton Salt*,[239] such an amendment is improbable given strong public resentment toward large chain stores.[240] Therefore, the approach taken in *Volvo* was the most efficient means of correcting the erroneous interpretation of the Act in *Morton Salt*.

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230. *See supra* note 116.

231. *See supra* note 116.

232. The Court in *Morton Salt* was aware of the distinction between price discrimination and price differential but chose to supplant price discrimination with price differential in order to give effect to what the Court believed to be Congress's intent. *See* FTC v. Morton Salt, 334 U.S. 37, 45 (1948).

233. Hansen, *supra* note 86, at 1118.

234. *Id.* at 1115–18.

235. *See* discussion *supra* Part III.C.ii–iii.

236. The Antitrust Modernization Commission concluded that Congress should repeal the Act; however, Congress has yet to act on the Commission's findings. *See* Zwisler, *supra* note 7, at 41.

237. *See* discussion *supra* Part III.C.1.

238. *See* Gavil, *supra* note 117, at 1062 (advocating for a change in judicial interpretation of the Robinson-Patman Act rather than the repeal or amendment of the Act); *see also* Kmeic, *supra* note 1, at 1468 (discussing a theory that the United States Supreme Court has a constitutional duty to overrule erroneous precedents in certain instances).

239. *See* Hansen, *supra* note 86, at 1201.

240. *Id.* at 1117.

B. Public Resentment Toward Large Chain Stores

Although economic theorists agree that the Court's application of the Robinson-Patman Act prior to *Volvo* promoted unsound antitrust policy,[241] supporters of the Act believe the Act is necessary to protect small businesses.[242] Indeed, at a public hearing in 2005 to discuss the fate of the Robinson-Patman Act, academics spoke against the statute, while those representing small business owners spoke in its favor.[243] Additionally, large chain store operations are still subject to strong public resentment.[244] For example, Arkansas-based Wal-Mart Stores, Inc. accounts for approximately one-fifth of the groceries sold in the United States, with its customers saving nearly seventeen percent compared to customers of other grocery stores.[245] Despite these apparent benefits to consumers, unions and politicians are quick to demonize Wal-Mart.[246] Moreover, the Chicago City Council recently passed a bill aimed at preventing Wal-Mart from operating within the city of Chicago.[247]

Congress passed the Robinson-Patman Act to protect small businesses from large chain stores similar to Wal-Mart.[248] As a result, legislative attempts to repeal the Robinson-Patman Act may focus on allegations of currying favor with big business, rather than focusing on sound economic principles.[249] Pro-union groups will likely begin lobbying to protect the Robinson-Patman Act, forcing members of Congress to take a side on the issue.[250] The union groups were successful in preventing Wal-Mart, a store that provides substantial savings to consumers, from operating within Chicago.[251] Therefore, it is conceivable that union groups and the political process would thwart any Congressional effort to repeal the Robinson-Patman Act.[252]

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241. *See* discussion *supra* Part III.B.

242. Hansen, *supra* note 86, at 1117.

243. *Robinson-Patman Act: Before the Antitrust Modernization Committee*, 109th Cong., 6–22 (2005).

244. *See* George F. Will, Editorial, Democrats vs. Wal-Mart, WASH. POST, Sept. 14, 2006, at A21.

245. *Id.*

246. *Id.*

247. *Id.*

248. *See* discussion *supra* Part III.A.

249. This is evidenced by the fact that immediate opposition from the House of Representatives met the Justice Department's attempt to repeal the act in the 1970s. *See* Hansen, *supra* note 86, at 1116.

250. *See id.* (discussing previous opposition to legislative attempts to amend or revoke the Robinson-Patman Act).

251. *See generally* Will, *supra* note 244.

252. During the 1970s the Justice Department recruited several pro-consumer groups, including one led by Ralph Nader, to support an amendment to the Robinson-Patman Act;

Recently, the Antitrust Modernization Committee recommended to Congress the complete repeal of the Robinson-Patman Act.[253] Similar committees reached the same conclusion in 1969 and 1997, yet the Act remains an anomaly in antitrust jurisprudence.[254] Ultimately, the committee resolved that the Act is fundamentally inconsistent with the goals of antitrust, and it is detrimental to consumer welfare.[255] Although an outright repeal of the Act is the most efficacious method for resolving the conflict inherent in the Act,[256] the Court's decision in *Volvo* was appropriate nonetheless. Congress did not adopt the recommendations of similar committees in the past, and there is no guarantee that Congress will accept the most recent recommendations to repeal the Act.

In *Volvo*, the Court was able to sidestep the political process and limit the Robinson-Patman Act to those instances in which an injury actually occurred, a result that the legislature might not have been able to reach.[257] An argument could be made that the Court inappropriately prevented the political process from running its course,[258] but such an argument ignores the fact that the Court was responsible for the breadth of Robinson-Patman Act.[259] Ideally, the public should evaluate antitrust policy because it is the product of legislative action;[260] however, the pedantic banter of antitrust theory does not resonate with the public.[261] Instead, proponents of the Robinson-Patman Act believe that the Act protects small businesses.[262] Although the Act ultimately harms consumers, the proof of the harmful effect is not strong enough to waver support for small business.[263] As a result, legislative action to correct this unsound antitrust policy was unlikely.[264] After *Volvo*, howev-

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however, the pro-consumer groups declined to support the amendment, even though it is undisputed that the act artificially inflated consumer prices. Hansen, *supra* note 86, at 1118.

253. ANTITRUST MODERNIZATION COMMITTEE, 110th Cong., REPORT AND RECOMMENDATIONS 312 (Comm. Print 2007).

254. *Id.*

255. *Id.*

256. *See id.* (discussing the futility of attempting to reconcile the Act with the broader goals of antitrust policy through piecemeal judicial interpretation).

257. Although the Antitrust Modernization Committee recommended repeal of the Act, there is no guarantee that Congress will adopt the commission's findings.

258. *See* Zwisler, *supra* note 7, at 43.

259. It is not unprecedented for the United States Supreme Court to overrule existing precedent, regardless of what action the legislature is taking on the issue. *See* Kmiec, *supra* note 1, at 1468 (discussing the United States Supreme Court's decision in *Planned Parenthood v. Casey* and *Lawrence v. Texas* in which the Court did not follow prior precedent).

260. *See* Hansen, *supra* note 86, at 1213.

261. *See id.* at 1118.

262. *Id.* at 1117.

263. *Id.*

264. *Id.*

er, the judiciary remains a viable vehicle to correct unsound antitrust policy despite political opposition to judicial activism.[265]

C. The Judiciary's Role in Interpreting Antitrust Policy

Ultimately, *Volvo* will have little impact on Robinson-Patman Act litigation. Prior to *Volvo*, the Justice Department had not enforced the Act for decades,[266] and plaintiffs were rarely successful in civil cases.[267] *Volvo* will not change this trend. Instead, *Volvo* is significant because the Court limited a fifty-seven-year-old precedent and limited a seventy-year-old act of Congress. By limiting the breadth of the Robinson-Patman Act, an act widely viewed as unsound antitrust policy,[268] *Volvo* shows that the Court is the appropriate branch to correct flawed antitrust policy.

Although there was not a public outcry to repeal the Robinson-Patman Act, it is not clear whether the public's silence represents support or apathy for the Act. Antitrust policy is not easy to comprehend, and it is unlikely that the public would engage in a serious dialogue over antitrust policy.[269] Moreover, organized opposition to large corporations often results in misleading marketing campaigns intended to sway public opinion and prevent a candid dialogue about the relevant issues.[270]

Both of these factors could prevent the public from making an informed evaluation of antitrust policy,[271] but these factors are less likely to influence the judiciary.[272] There is a possibility that judges will rely on flawed economic analysis;[273] however, this potential risk of harm is not as great as the actual harm that results when judges do not act. Without question, the Robinson-Patman Act is detrimental to consumers by subjecting them to higher prices.[274] Despite this fact, Congress has yet to amend or repeal the act.[275] As a result, judicial action was imperative to ensure that the Robinson-Patman Act benefits consumers, not competitors.

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265. *See* George W. Bush, President of the United States, Remarks at Georgia Victory 2006 Rally (Oct. 30, 2006) (denouncing judicial activism).

266. *Id.*

267. *See* discussion *supra* Part III.C.2–3.

268. *See* discussion *supra* Part III.B.

269. Hansen, *supra* note 86, at 1117–18.

270. *See generally* Will, *supra* note 244 (describing an advertisement against Coca-Cola intended to influence public opinion).

271. *See* Hansen, *supra* note 86, at 1117–18.

272. *But see* Shores, *supra* note 97, at 1093–95 (discussing reasons against courts relying on economic theory in resolving antitrust disputes).

273. *Id.* at 1094.

274. Hansen, *supra* note 86, at 1118.

275. Zwisler, *supra* note 7, at 41.

Volvo is significant because it shows a willingness by the Court to correct unsound antitrust policy when Congress was unwilling or slow to do so. By addressing a flaw in antitrust policy relative to price discrimination, the Court in *Volvo* ultimately paved the way for the Court to interpret antitrust policies so that such policies will protect consumers, not competitors. In the process, the Court did what previous courts and Congress were unwilling to do: interpret the Robinson-Patman Act so that it promotes healthy competition.[276]

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276. *See* Volvo v. Reeder-Simco, 126 S. Ct. 860, 872 (2006).

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